Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1542

DENZIL R. ALLEN, Petitioner,

vs.

ROLLAND F. VanCANTFORT, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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March 30, 1971

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No._____

DENZIL R. ALLEN,)
Petitioner,)
)
-vs-)
)
ROLLAND F. VanCANTFORT,)
Respondent.)

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

The petitioner, Denzil R. Allen, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on January 12, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appen-

dix hereto. The opinion of the United States District Court for the District of Maine has been officially reported at 316 F. Supp 222 (1970) and appears in the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on January 12, 1971. The jurisdiction of this Court is invoked under the provisions of 28 United States Code, § 1254(1).

QUESTIONS PRESENTED

Is an accused denied effective assistance of trial defense counsel when counsel:

a. had evidence of insanity and other defenses but intentionally concealed it from the trial court in order to maintain the integrity of a guilty plea and to reserve the insanity issue for appeal?
b. failed to determine mental competency of accused prior to signing a pre-trial guilty plea agreement?
c. failed to have matter of accused's

mental capacity to stand trial constitutionally adjudicated?

Is an accused denied due process and equal protection of the law when:

a. he is denied the right to cross-examine military doctors who examined him on order of a court of appeals which then decided that issue against him on hearsay medical reports?
b. he is allowed to plead guilty to specifications alleging five (5) acts of premeditated murder when such plea is expressly forbidden by statute?
c. the Navy Court of Military Review, United States District Court and United States Circuit Court of Appeals all render decisions which are in real conflict with decisions of other courts of appeals?

CONSTITUTIONAL, STATUTORY AND MANUAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENTS 5 and 6

ARTICLES 45(b), 49(d)(f) and 118, UNIFORM CODE OF MILITARY JUSTICE, TITLE 10, FEDERAL CODE ANNOTATED (§ 845 and 918)

PARAGRAPHS 70, 121, 124, 144d, 145a and 154a(1)(3)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951)

STATEMENT OF THE CASE

Petitioner filed his habeas corpus action in the District Court pursuant to 28 United States Code § 2241 et seq. alleging unconstitutional restraint.

Petitioner, a twice wounded veteran on his second combat tour in Vietnam, with a spotless record and no evidence of prior convictions, was persuaded by counsel possessing evidence of insanity, to enter a plea of guilty to five acts of premeditated murder in the sadistic and bizarre executions of five Vietnamese whom petitioner considered Viet Cong, said killings occurring after 34 days of continuous combat. See p. 26, Appendix to Brief, Circuit Court. Said charges were brought pursuant to Article 118, Title 10, United States Code of Military Justice. He was found guilty, sentenced to be dishonorably discharged, to forfeit all pay and allow-

ances, confined at hard labor for the term of his natural life and to be reduced to the pay grade of E-1. Pursuant to a pre-trial agreement, the period of confinement was reduced to twenty (20) years and petitioner was ordered placed in temporary custody of the United States Naval Disciplinary Command, Portsmouth Navy Yard, Kittery, Maine, pending final review by the Military Court of Review.

Petitioner contended he received ineffective assistance of defense counsel which resulted in a denial of due process and a loss of jurisdiction in the trial court as a consequence thereof. Petitioner alleged his counsel was aware of evidence that he might have been insane at the time the alleged offenses occurred. See pp.86-93, Appendix to Brief, Circuit Court. In spite of this evidence and evidence of other legitimate defenses on the merits,

counsel made no effort to obtain a psychiatric examination of the petitioner to assist him in developing the issue of insanity and in determining the best defensive course to pursue, prior to allowing him to plead guilty pursuant to the pretrial agreement. Counsel's excuse was that he was of the opinion that he could not obtain favorable reports from the military psychiatrists available to him in Vietnam. See p. 406, Appendix to Brief, Circuit Court. Though procedures existed whereby petitioner could have been returned to the United States for civilian psychiatric examination prior to entering any plea, trial defense counsel made no effort to avail himself of that opportunity. See pp. 64, 65, 89 and 406, Appendix to Brief, Circuit Court.

Trial defense counsel negotiated a pretrial agreement whereby petitioner would

plead guilty to five (5) specifications alleging premeditated murder on condition the government would treat the offenses as non-capital and reduce the sentence from mandatory life to twenty years when the case was presented for review. This procedure violates Article 45, Uniform Code of Military Justice, Title 10, Federal Code Annotated, § 845. See p. 73, Appendix hereto. Evidence is further to the effect that this pre-trial agreement was executed by petitioner while he was incarcerated in a dog kennel, in Vietnam. See p. 237, Appendix to Brief, Circuit Court.

The verbatim record of the guilty plea establishes that counsel intentionally withheld evidence of any defense from the trial judge conducting the providency hearing in order that the providency of the plea would not be disturbed. See

pp. 565-579, Appendix to Brief, Circuit Court. Counsel's reason for his conduct was later explained in his post-trial affidavit in which he stated that he was reserving the defense of insanity for appeal. See p. 406, Appendix to Brief, Circuit Court.

On appeal, petitioner, represented by newly appointed military, as well as retained civilian counsel, submitted three psychiatric reports and a report from a clinical psychologist which, read in conjunction with each other, established a prima facie case of insanity on the part of petitioner. See pp. 483-506 and pp. 584-595, Appendix to Brief, Circuit Court. The Navy Court of Military Review issued its order requiring petitioner to submit to examination by a board of Navy doctors, whose report was to the effect that at the time of the commission of the alleged

offenses, petitioner was able to distinguish between right and wrong and had the ability to adhere to the right, though such ability was moderately impaired due to the stress of combat. See pp. 598-609, Appendix to Brief, Circuit Court.

Prior to argument on his appeal, petitioner filed a motion requesting an evidentiary hearing on the issue of insanity whereby he could subject the military doctors to cross-examination. This motion was denied. See pp. 622-623, Appendix to Brief, Circuit Court. When petitioner's contentions were decided adversely by the Navy Court of Military Review , (See pp. 610-620, Appendix to Brief, Circuit Court) a petition was filed with the Court of Military Appeals for a Grant of Review. See pp. 314-353, Appendix to Brief, Circuit Court. The motion was denied in a 2-1 split decision. See p. 518, Appendix

to Brief, Circuit Court.

In the evidentiary hearing before the United States District Court, the entire record of the military proceedings was admitted into evidence. See p. 4, Appendix to Brief, Circuit Court. In addition, live testimony was also submitted. See pp. 1-240, Appendix to Brief, Circuit Court. Those testifying included your petitioner, (See pp. 210-237, Appendix to Brief, Circuit Court) two psychiatrists who testified that petitioner was not able to adhere to the right on the days the alleged offenses occurred, (See pp. 145-200, Appendix to Brief, Circuit Court) five former Judge Advocate General officers who had personal knowledge of the facts and circumstances surrounding your petitioner's case (See pp. 56-142 and pp. 202-209, Appendix to Brief, Circuit Court) and, petitioner's former commanding offi-

cer (See pp. 20-55, Appendix to Brief, Circuit Court). All witnesses appeared voluntarily.

Four of the former JAG officers who testified for petitioner had represented defendants in companion cases. See pp. 56-142, Appendix to Brief, Circuit Court. In one case, counsel had secured the return of his client to the United States for psychiatric evaluation. He plead him not guilty because of insanity, and through the testimony of civilian psychiatrists flown to Vietnam at the expense of the government, he was found not guilty. See pp. 64, 65 and 74 Appendix to Brief, Circuit Court. The facts and circumstances involved in that case were almost "parallel" to petitioner's herein. See p. 58, Appendix to Brief, Circuit Court. Three others accused were plead guilty to acts of unpremeditated murder,

in return, in two cases, for promised maximum terms of 15 years, and in the other, a 13-year maximum. Pleas were entered and three Courts hearing evidence, returned identical sentences of 2 years. See p. 128, Appendix to Brief, Circuit Court.

Testimony by Dr. Robert Stevenson, a defense psychiatrist at the hearing, established petitioner's ability to understand the details of his pre-trial agreement was affected by the same mental derangement affecting the petitioner at the time the offenses were committed. See p. 178, Appendix to Brief, Circuit Court.

The United States Attorney produced the attendance of petitioner's former trial defense counsel. Petitioner placed him on the stand but was unable to have the Court declare him an adverse witness in spite of the highly prejudicial nature of an affidavit he had executed and which was

contained in the military record. See p. 18, Appendix to Brief, Circuit Court. As a consequence, petitioner withdrew him from the stand assuming that the government would use him later as a witness.

The government rested without placing trial defense counsel or any witnesses on the stand. Petitioner contends, therefore, that he sustained the burden of proving his allegations. The District Court found that trial defense counsel was not ineffective and that the military had given full and fair consideration to petitioner. The Circuit Court affirmed that finding.

REASONS FOR GRANTING WRIT

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEAL

The Circuit Court based its decision on two primary cases in finding trial defense counsel's tactic sound. See p. 36, Appendix hereto. These cases are: Brubaker

vs. Dixon, 310 F.2d 30, 37 (9th Cir., 1962) holding that he is not to be judged by hindsight and U.S. ex rel. Boucher vs. Reincke, 341 F.2d 977, 982 (2d Cir., 1965) which established the general rule that his conduct must be such as to shock the conscience of the Court. See p. 36, Appendix hereto. In so doing, the Circuit Court disregarded later cases which qualify those basic rules.

In determining the effectiveness of trial defense counsel's alleged tactic, he must be charged with having knowledge of the law as it existed at the time he chose the strategy he intended to employ. Petitioner asserts that the law at the time his trial defense counsel formulated his defense, was diametrically opposed to his conduct.

In 1964, the Eighth Circuit touched upon the issue involved here. In Swisher vs.

U.S., 326 F.2d 97, that Circuit held:

> "...our conclusion is that appellant has set forth therein (petition for habeas corpus) some factors which give facial indication of a possible issue existing, that his mental competency to stand trial may not have been constitutionally adjudicated at his court-martial." (Emphasis supplied)

Later, the Fourth Circuit ruled that an insane man may not be tried for a crime; Owsley vs. Peyton, 352 F.2d 804, 805. The Circuit Court reversed the District Court and remanded for a hearing on that issue. The District Court awarded a full hearing and ordered the petitioner released unless seasonably retried. On appeal, the Fourth Circuit ruled:

> "The state is quite right that no evidential showing was made to the criminal court of any doubt as to Owsley's mental condition. However, it appears that his attorney must have been aware that proof of the uncertainty was at hand. The lawyer's failure to adduce it in Court, we think, rendered his representation of Owsley ineffective to the point of depriving him of his constitutional right to counsel."

Owsley vs. Peyton, 368 F.2d 1002, 1003 (1966)

The Fourth Circuit was again called upon in 1967 to consider facts very similar to those involved in the instant case, in deciding Kiebert vs. Peyton, 383 F.2d 566. The petitioner had plead guilty. In his habeas corpus proceedings he alleged he was insane at the time of trial. The Circuit Court ruled at page 569 that:

> "Failure of the defendant's lawyer to explore matter and adduce evidence in Court where there was reason for doubt as to the mental condition of the accused, constituted a denial of his right to effective assistance of counsel. ...the Supreme Court has held categorically that the defense of incompetence to stand trial cannot be waived by the incompetent. Pate vs. Robinson, 383 U.S., 375, 86 S Ct. 836, 15 L ed 2d 815 (1966), and it ineluctably follows that his counsel cannot waive it for him by failing to move for examination of his competency. ...Since, in these circumstances neither counsel nor Court acted to have the defendant examined at the time of his trial, the question may be raised in post-conviction proceedings."

As the above cases clearly establishes

the law as it existed at the time trial defense counsel evolved his defense tactic, it establishes without a doubt that his proposed strategy would be ineffective as a matter of law. This being so, then he is not being judged, at this time, by hindsight. That such conduct was shocking to the conscience of the Court as a matter of law was so held in the case of Goodwin vs. Swenson, 287 F.Supp 166 (8th Cir., 1968). In that case, the District Court in defining the farce and sham rule, quoted People vs. Ibarra, 60 Cal 2d 460, 386 P 2d 487 (1963) as follows:

> "It is counsel's duty to investigate carefully all defenses of fact and of law that may be available to the defendant and if his failure to do so results in withdrawing a crucial defense from the case, the defendant has not had the assistance to which he is entitled." (See p. 183-184, of this decision)

Applying the above decisions to the basic rules enunciated by the First Cir-

cuit, it is clear that its decision is in real conflict with the later cases.

In addition, trial defense counsel's conduct, viewed in light of the above decisions, especially Goodwin vs. Swenson, 287 F.Supp 166 (1968) readily establishes that more than one crucial defense was lost to the petitioner. It was conceded by the government trial counsel in his letter approving the petitioner's tendered pre-trial agreement that the evidence known to him strongly indicated that petitioner honestly felt that what he had done was "an act of war, that is to say, an act which was in the furtherance of the mission of finding and killing the enemy." See pp. 560, 561, Appendix to Brief, Circuit Court. Paragraph 154a (1)(3)(4) provides for the honest mistake of fact defense in a specific intent crime. See pp. 77-78, Appendix

hereto. It must have been obvious to defense counsel that there was more than one defense available to him.

The military has been called upon on numerous occasions to consider the issue of incompetent counsel and has demanded, in the past, a high standard of its counsel. The Court of Military Appeals has denounced defense counsel when it was established that he withheld evidence to avoid contravening a guilty plea, U.S. vs. Rose, 30 CMR 400 (1961); they have required counsel to present such evidence as is known and available to him which would manifestly and materially effect the outcome of a case. U.S. vs. Rosenblatt, 32 CMR 28 (1962); they have required that defense counsel make ample investigation of all avenues of defense. U.S. vs. McMahan, 21 CMR 31 (1956) and stated in U.S. vs. McFarlane, 23 CMR 320, 324 (1957):

> "...we can find no justification for tossing away the remotest possibility of reducing the crime from felony murder to a lesser offense without some showing that medical experts have made a thorough mental examination of the accused to ascertain his mental capacity to form a specific intent required by the offenses charged...When a crime is committed overseas and possible avenues of defense extend to this country, ten days is inadequate to prepare a defense of a capital case."

The District Court found that trial defense counsel became convinced that the evidence against the petitioner, which included his own confession was overwhelming and that the chances of getting a favorable psychiatric report in Vietnam were remote. See p. 36, 52, Appendix hereto. Evidence usually is overwhelming against an insane man accused of a criminal charge, but the fact that he is insane is a complete defense, despite that evidence. A confession signed by an insane man is as worthless as his signed agreement to plead guilty. How our system of law can

acquiesce in a trial tactic which incorporates deceiving a trial Court by withholding evidence for the avowed purpose of raising it on appeal, is incomprehensible. It condemned to prison a person who very likely was innocent. The American system of justice has never embraced such a tactic.

The recognition by both the District and Circuit Courts that petitioner could not receive a favorable psychiatric examination in Vietnam is tantamount to a judicial admission that he could not receive a constitutionally fair trial in that country. See p. 36 and 52, Appendix hereto. The decisions completely ignore the fact that counsel could have had the defendant returned to the United States for psychiatric evaluation, as was testified to by two witnesses in the evidentiary hearing, (See pp. 64-65 and p. 89, Appendix to

Brief, Circuit Court) and could have used the information gained in determining the most effective defense to pursue, prior to entering any plea.

As the opinion below is in real conflict with those of other Circuits, of this Honorable Court, and the Court of Military Appeals, certiorari should be granted to review the judgment below.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE MANNER OF RAISING THE DEFENSE OF INSANITY, ON APPEAL, UNDER THE UNIFORM CODE OF MILITARY JUSTICE

Trial defense counsel's defense tactic envisioned raising the defense of insanity on appeal. Though appellate defense counsel on appeal assailed the withholding of evidence from the court-martial and the reservation of the sanity issue for appeal, an attempt was made to implement the tactic before the Navy Court of Review. Three psychiatric reports and a

report from a clinical psychologist were tendered to the Military Court. In addition, affidavits from witnesses as to abnormal behavior on the part of your petitioner were also filed with that Court. The cumulative effect established petitioner's prima facie case of insanity.

The Court appointed military doctors to examine the petitioner who found him sane, but having a moderately impaired ability to adhere to the right on the days the offenses occurred. By motion, petitioner demanded an evidentiary hearing in order to subject these doctors to cross-examination. This motion was denied, and the Navy Court found the issue of insanity had not been raised. Such a ruling clearly violates Paragraph 144d of the Manual. See p. 77, Appendix hereto. Medical reports are not evidence, and may be used only for determining if an issue

of insanity is raised, and if so, confers upon the parties their right to subject the hearsay opinions to cross-examination. (See U.S. vs. Thomas, 32 CMR 163 (1962); U.S. vs. Thomas, 36 CMR 589 (1966); and U.S. vs. Moore, 36 CMR 488 (1966))

The Circuit Court found no constitutional defect in the military procedure and cited U.S. vs. Roland, 26 CMR 181 (1958) and U.S. vs. Wimberly, 36 CMR 159 (1966) as authority. Those two cases, though easily distinguishable from petitioner's on their facts, held that the Court of Review could decide this "procedural" issue. Such procedure does not afford due process for the reason it denies a petitioner his right to confront witnesses. See p. 72, Appendix hereto.

The decision below shows there is no effective procedure whereby an accused may raise the issue of insanity on appeal

as provided for by Paragraph 124 of the Manual. See p. 76, Appendix hereto. This results in a denial of the petitioner's right to have the issue constitutionally adjudicated. (See Pate vs. Robinson, 383 U.S. 375, 15 L ed 815 (1966) in this regard) For this reason, certiorari should be granted to review the judgment below.

3. ERROR WAS COMMITTED IN THE COURT BELOW WHEREBY THE DECISION, IF ALLOWED TO STAND, WILL HAVE AN ADVERSE EFFECT ON THE RIGHTS OF DEFENDANTS IN MILITARY CAPITAL OFFENSE CASES

Article 45(b), Uniform Code of Military Justice, Title 10, Federal Code Annotated, § 845, a part of which has been reproduced and may be found at p. 73, Appendix hereto:

> "A plea of guilty may not be received to any charge or specification ALLEGING an offense for which the death penalty MAY be adjudged." (Emphasis supplied)

The specification sheet against the petitioner ALLEGED such offenses (See p.

357, Appendix to Brief, Circuit Court), was never amended, and does not contain any words which indicate that the guilty plea was being taken to a lesser included offense, i.e. non-premeditated murder, etc., as permitted by Para. 70, Manual for Courts-Martial, United States (1951). See p. 74, Appendix hereto. It is an elementary principle of law that criminal statutes must be strictly construed. Such a construction clearly forbids the guilty plea which was accepted in this case. Petitioner concedes that the convening authority agreed to treat the case as "non-capital". Such "treatment" can only have the effect of an unconstitutional attempt to create a new offense, to-wit: non-capital premeditated murder. No such offense exists, but even arguendo, if it did, where is such offense ALLEGED in this case? It certainly does not appear on the

charge and specification sheet which is supposed to tell the uninformed and presumably innocent accused "the nature and cause of the accusation against him" as required by the Sixth Amendment. See p. 72, Appendix hereto.

As stated above, the convening authority referred petitioner's case to the Court as a "non-capital" case. This was done in an unlawful attempt to circumvent the Uniform Code of Military Justice. The only provision found in the Code which makes any reference to referring a capital case, as non-capital, is found in Article 49(d)(f), Title 10, Uniform Code of Military Justice, § 849. See p. 73, Appendix hereto. The Manual also makes reference to this Article in Paragraph 145. See p. 77, Appendix hereto. Article 49 deals with the taking of depositions and their subsequent use. That Article as well as

Paragraph 145 very clearly implies Congress had a trial in mind and not a guilty plea. A strict construction of Article 45(b) makes this even more obvious because that Article clearly prohibits a plea of guilty to a charge or specification alleging an offense for which the death penalty may be adjudged.

To allow the convening authority to follow this procedure in a capital case opens the door to undue command influence, that which the Uniform Code of Military Justice was enacted to prevent. It deprives the court-martial of its statutory right to determine an appropriate penalty in a given case and leaves the accuser sitting in final judgment. It makes a sham and mockery out of the providency hearing, invites and sanctions fraud, turns the accused, his defense counsel and government trial counsel into mere Thespians,

and makes puppets out of the members of the Court. All of the above occurred in your petitioner's case and is the ultimate in what can be expected to reoccur if this procedure is upheld. For this reason, certiorari should be granted to review the decision below.

CONCLUSION

The failure of trial defense counsel to seek medical assistance to determine petitioner's competence, denied him effective assistance of counsel. His attempt at reserving the issue of insanity for appeal is unsupported by military precedent and is contrary to the intent of the Code. The failure on the part of the Navy Court of Military Review to abide by the Code, Manual provisions and prevailing case law, denied petitioner his constitutional right to cross-examination. The procedure followed by the military denied him due pro-

cess of law. Prejudice is presumed therefore, as a matter of law. In addition, the guilty plea to specifications alleging premeditated murder are in clear violation of the Code. For all of these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

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March 30, 1971

United States Court of Appeals
For the First Circuit

No. 7701

DENZIL R. ALLEN,
PETITIONER, APPELLANT,

v.

ROLAND F. VanCANTFORT, ETC.,
RESPONDENT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

George E. Martz and *George W. Latimer*, with whom *Johnson, Weaver & Martz* was on brief, for appellant.
Charles J. Keever, Director, Appellate Government Division Navy Appellate Review Activity, with whom *Peter Mills*, United States Attorney, was on brief, for appellee.

January 12, 1971.

McENTEE, *Circuit Judge*. On June 5, 1968, petitioner, then a lance corporal in the United States Marine Corps, was charged before a general court-martial convened at Da Nang, South Vietnam, with five specifications of premeditated murder in violation of Article 118 of the Uniform Code of Military Justice, 10 U.S.C. § 918 (1964).[1] Ac-

[1] The charge sheet alleged that on May 5, 1968, at or near Van Duong Village, petitioner murdered Nguyen Van Den and Nguyen Cuu Phu with premeditation by shooting them with an M-16 rifle; and that on May 6, 1968, at or near Van Duong Bridge, he murdered Ho Lau and Huynh Van Phuc with premeditation by shooting them with an M-16 rifle and detonating grenades near them, and murdered Ho Cam by "hanging him by the neck, cutting his throat with a knife, stabbing him with a knife, then throwing him into a stream and while

cording to a stipulation of fact all five victims were unarmed Vietnamese who offered no resistance. On September 9, 1968, petitioner pleaded guilty to all five specifications. In accordance with a pretrial agreement he was sentenced to be reduced to Pay Grade E-1, to be confined at hard labor for twenty years, to forfeit all pay and allowances, and to be dishonorably discharged from the service.

Petitioner appealed his conviction to the United States Navy Court of Military Review, arguing, *inter alia*, that he was not mentally responsible at the time of the commission of these offenses and that his trial counsel was incompetent. On November 7, 1969, the court affirmed his conviction. Two habeas corpus petitions were dismissed by the district court for failure to exhaust all available military remedies. *See Allen* v. *VanCantfort*, 420 F.2d 525 (1st Cir. 1970). After a petition for review pursuant to Article 67 of the Uniform Code of Military Justice, 10 U.S.C. § 867 (Supp. V, 1970), *amending* 10 U.S.C. § 867 (1964), was denied by the United States Court of Military Appeals, the district court considered petitioner's habeas corpus petition pursuant to 28 U.S.C. § 2241 (1964). *Burns* v. *Wilson*, 346 U.S. 137, 139 n.1 (1953). This is an appeal from the district court's denial of that petition.

At the outset petitioner contends that, although the court-martial admittedly had jurisdiction of the subject-matter and of the person, it "lost" jurisdiction by virtue of its failure to adhere strictly to the procedural requirements of the Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1964), which prevent guilty pleas in cases in which the charge alleges "an offense for which the death penalty may be attached." This argument is based on a statement in *McClaughry* v. *Deming*, 186 U.S. 49 (1902), that, because a "court-martial is the creature

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the said Ho CAM was therein, shooting him with an M-16 rifle and detonating grenades on or near him."

of statute . . . it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction" and that it can "give effect to its sentences . . . [only if] all the statutory regulations governing its proceedings [have] been complied with." *Id.* at 62-63. Following cases subsequent to *Deming*, we read that case as reaching only laws that govern the convening of courts-martial. An error of law not affecting the constitution of the court, its jurisdiction over person and subject matter, or the validity of its sentence, does not cause the court-martial to "lose" jurisdiction. *See Humphrey* v. *Smith*, 336 U.S. 695 (1949). *See generally United States ex rel. Innes* v. *Hiatt*, 141 F.2d 664, 665 (3d Cir. 1944); Note, Developments in the Law — Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1211-12 & n.20 (1970). Whatever need there may have been for *Deming*'s fictional approach to describe as "jurisdictional" errors not strictly so, disappeared with cases that faced directly the question what issues could be raised in federal habeas proceedings. *Burns* v. *Wilson, supra* (review of military courts); *Brown* v. *Allen*, 344 U.S. 443 (1953) (review of state courts); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938) (review of federal courts).

However, these cases show that our refusal to find lack of jurisdiction does not solve the problem; we must decide whether petitioner can raise, on its own terms, an alleged error of federal statutory law committed by a military court. We hold that he can, resting this decision on the language of the habeas statute. Petitioner can challenge his custody as being "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c) (3). Given this language, we cannot refuse to consider all alleged errors of law committed by the military without explicit authority for doing so. We cannot read *Burns* v. *Wilson, supra*, as such authority; in men-

tioning only errors of constitutional magnitude, *Burns* was facing the only question before it. *And see Jackson* v. *Taylor,* 353 U.S. 569 (1957) (on habeas, decision based on interpretation of provision of Uniform Code of Military Justice).

Apart from alleged constitutional errors, petitioner makes this claim of a violation of the "laws . . . of the United States." He pleaded guilty to premeditated murder, a capital offense. He claims that this plea was received in violation of Article 45(b) of the Uniform Code of Military Justice, 10 U.S.C. § 845(b) (1964), which provides: "a plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged." The government argues that this technical defect was cured by the fact that, several days prior to petitioner's guilty plea, the convening authority had signed a reference to trial indicating that the case was to be treated as non-capital. We hold that this satisfied the requirement of Article 45(b) since petitioner was pleading to a charge in which the court-martial had no power to impose a death sentence, and so the statute, referring to cases in which the death penalty "may be adjudged," did not bar the plea.

With respect to constitutional issues, the scope of review in habeas corpus challenges to military convictions is more limited than in comparable civilian cases. *Burns* v. *Wilson, supra* at 139; *Kennedy* v. *Commandant,* 377 F.2d 339, 342 (10th Cir. 1967); *Swisher* v. *United States,* 354 F.2d 472, 475 (8th Cir. 1966). In addition, the Supreme Court has said that civil courts should not consider constitutional allegations that have been dealt with "fully and fairly" by a military tribunal. *Burns* v. *Wilson, supra* at 142. There would appear to be little doubt that petitioner's principal constitutional contention here, *viz.,* that he was denied effective assistance of counsel, was fully

considered by the United States Navy Court of Military Review. But we note that considerable confusion has surrounded the "full and fair consideration" standard enunciated in *Burns*. Its validity has been questioned and criticized by both courts and commentators since it was first announced. *See Burns* v. *Wilson, supra* at 149 (Frankfurter, J., separate opinion) and at 844 (Frankfurter, J., dissenting on denial of rehearing); *Rushing* v. *Wilkinson*, 272 F.2d 633, 641 (5th Cir. 1959), *cert. denied*, 364 U.S. 914 (1960); Wiener, *Courts-Martial and The Bill of Rights: The Original Practice II*, 72 Harv. L. Rev. 266, 302-303 (1958). Some courts have held that the "full and fair consideration" standard applies only to questions of fact. *Kennedy* v. *Commandant, supra*, 377 F.2d at 342-43, or at least that it does not apply to pure questions of law, *Augenblick* v. *United States*, 377 F.2d 586, 593 (Ct. Cl. 1967), *rev'd on other grounds*, 393 U.S. 348 (1969);[2] *Shaw* v. *United States*, 357 F.2d 949 (Ct. Cl. 1966). Other courts have reviewed cases on the merits where the alleged constitutional violation was so unfair as to shock the conscience. See *Ashe* v. *McNamara*, 355 F.2d 277, 280 (1st Cir. 1965); *Sweet* v. *Taylor*, 178 F.Supp. 456, 458 (D. Kan. 1959).[3] In view of the questions that have been raised

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[2] It can be argued that the Court's failure to reverse the Court of Claims on this point casts further doubt on the continuing validity of the "full and fair consideration" standard. The Court has apparently never reiterated that standard although it has cited *Burns* for other propositions of law. See *United States* v. *Augenblick*, *supra*, 393 U.S. at 350 n.3 (review of conviction by a military tribunal can be obtained by habeas corpus); *Reid* v. *Covert*, 354 U.S. 1, 37 n.68 (1957) (the extent to which the Bill of Rights applies to military tribunals is as yet unsettled); *Fowler* v. *Wilkinson*, 353 U.S. 583, 584 (1957) (the Supreme Court retains no supervisory power over the courts which enforce military law).

[3] In *White* v. *Humphrey*, 212 F.2d 503 (3rd Cir.), *cert. denied*, 348 U.S. 900 (1954), and *Application of Stapley*, 246 F.Supp. 316 (D. Utah 1965), the "full and fair consideration" standard was simply ignored by the court.

elsewhere regarding the appropriate scope of review in these cases, we deem it appropriate to follow our brethren in other circuits and review briefly petitioner's claims on the merits. See *Swisher* v. *United States, supra,* 354 F.2d at 475 (8th Cir. 1966); *Kasey* v. *Goodwyn,* 291 F.2d 174, 178 (4th Cir. 1961), *cert. denied,* 368 U.S. 959 (1962); *Rushing* v. *Wilkinson, supra,* 272 F.2d at 642 (5th Cir. 1959). *But see Mitchell* v. *Swope,* 224 F.2d 365 (9th Cir. 1955); *Bourchier* v. *Van Metre,* 223 F.2d 646 (D.C. Cir. 1955).

Petitioner's central contention is that he received ineffective assistance of counsel because his attorney advised him to plead guilty rather than to defend on the ground of lack of mental responsibility. In this connection, we note that it has been uniformly held that effectiveness of counsel is not to be judged by hindsight, *Brubaker* v. *Dickson,* 310 F.2d 30, 37 (9th Cir. 1962), *cert. denied,* 372 U.S. 978 (1963), and that the appropriate test is whether counsel's actions were so incompetent as to shock the conscience of the reviewing court. *United States ex rel. Boucher* v. *Reincke,* 341 F.2d 977, 982 (2d Cir. 1965). *Accord, Bruce* v. *United States,* 379 F.2d 113 (D.C. Cir. 1967); *Turner* v. *Maryland,* 303 F.2d 507 (4th Cir. 1962). In the instant case the advice rendered by petitioner's trial counsel not only fails to shock the conscience but appears to have been eminently sound under the circumstances. As the district court found, the evidence against petitioner, which included his own confession, was overwhelming. The chances of obtaining a favorable report from the military psychiatrists available in Vietnam appeared to be remote, as did the probability of winning acquittals on all five specifications. Furthermore, counsel knew that, if on appeal the Navy Court of Military Review determined that there was a reasonable doubt concerning petitioner's sanity, he would be retried; and that, even if he were again found guilty, the maximum sentence

would be limited to the twenty years specified in the pretrial agreement. In any event, with good behavior, petitioner's maximum period of confinement would be seven years.

In addition to the allegation that his counsel's trial strategy was incompetent, petitioner maintains that he was either deliberately misled or, at a minimum, inexcusably misinformed when counsel told him that the insanity defense could be raised on appeal. He claims that he would not have pleaded guilty had he thought this defense could not be raised later. Petitioner concedes that the regulations imply that the insanity question can be raised on appeal.[4] But he contends that, under the statute, he could not legally petition for a new trial without alleging fraud or new evidence that could not have been discovered through the exercise of due diligence at the time of trial. 10 U.S.C. § 873 (1964); Manual for Courts-Martial, United States, ¶ 109(d) (1951). It is clear from its lengthy opinion that the Court of Review carefully considered on the basis of new evidence whether petitioner had made out a prima facie case of insanity on appeal. Thus, even if he were technically correct that he lost his *right* to appeal by virtue of counsel's failure to assert a known defense at trial, petitioner suffered no prejudice. Furthermore, in concluding that it was authorized to consider the insanity issue on appeal, the court relied on the teachings of *United States* v. *Thomas, supra* note 4, and *United States* v. *Roland,* 9 U.S.C.M.A. 401, 26 C.M.R. 181 (1958). It is within the province of the

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[4] Paragraph 124 of the Manual for Courts-Martial, United States (1951) requires the Court of Review to disapprove findings of guilty if "it appears from the record of trial or otherwise that further inquiry as to the mental condition of the accused is warranted in the interest of justice, regardless of whether any such question was raised at trial." According to *United States* v. *Thomas,* 13 U.S.C.M.A. 163, 32 C.M.R. 163 (1962), if a prima facie case of insanity is made out, the Court of Review must order a new trial.

Petitioner was tried under the 1951 Manual. Paragraph 124 of the revised edition (effective August 1, 1969) is substantially identical.

military courts to resolve procedural issues of this type.[5] See *United States* v. *Augenblick*, 393 U.S. 348, 352-53 (1969), *rev'g, Juhl* v. *United States*, 383 F.2d 1009 (Ct. Cl. 1967).

Petitioner makes numerous additional allegations regarding the conduct of his defense counsel. He alleges, for example, that counsel failed to investigate the charges, interview possible defense witnesses, or inform him of the requirement that the government must prove him guilty beyond a reasonable doubt. He also accuses counsel of committing a fraud on the court-martial by stating that he knew of no other defenses that could be raised on his client's behalf. None of these allegations are supported by the record. Petitioner also contends that he was denied equal protection and due process because one of his co-defendants was never tried, two were found not guilty, two received clemency, and one received a mere two-year sentence. Although equal protection would of course require that the proceedings against petitioner and his co-defendants accord them all substantially the same procedural safeguards, *see generally Connor* v. *Picard*, No. 7537 (1st Cir., Dec. 10, 1970), there is no constitutional requirement that their cases receive the same final disposition.[6]

Petitioner's remaining constitutional arguments may be dismissed summarily. The charges brought against him were clearly specific enough to "[apprise] the defendant

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[5] On appeal, after studying six somewhat contradictory psychiatric reports, the Court of Review determined that petitioner had failed to make out a prima facie case of insanity. Petitioner argues that his sixth amendment right "to be confronted with the witnesses against him" was violated because he had no opportunity to cross-examine the military psychiatrists who had submitted reports. We see no constitutional defect in this procedure which has been adopted by the military courts merely for determining whether a prima facie case has been made out. See *United States* v. *Roland*, *supra; United States* v. *Wimberley*, 16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966).

[6] Although it is technically not relevant, we note in passing that there was ample support in the record for the district judge's finding that this defendant was the ringleader in all five murders.

of what he must be prepared to meet" and to defend himself in any future proceedings taken against him for a similar offense. *Russell* v. *United States*, 369 U.S. 749, 763-64 (1962). Assuming *arguendo* that *Miranda* v. *Arizona*, 384 U.S. 436 (1966), applies to military prisoners, petitioner waived his right to raise the issue of non-compliance with *Miranda* when he pleaded guilty. *McMann* v. *Richardson*, 397 U.S. 759 (1970). Finally, although the Court suggested in *Pate* v. *Robinson*, 383 U.S. 375, 384 (1966), that the defense of incompetency to stand trial can probably not be waived, there is no evidence in this record to support an allegation of incompetency at the time of trial.

Affirmed.

Adm. Office, U. S. Courts — Blanchard Press, Inc., Boston, Mass.

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SOUTHERN DIVISION

DENZIL R. ALLEN, Petitioner	:	
v.	:	Civil No. 11-92
ROLLAND F. VanCANTFORT, Respondent	:	

OPINION AND ORDER OF THE COURT

GIGNOUX, J.

On September 9, 1968, at Da Nang, Republic of Vietnam, Denzil R. Allen, then a Lance Corporal in the United States Marine Corps, was found guilty by a general court-martial, upon his plea of guilty, of five specifications of premeditated murder, in violation of Article 118 of the Uniform Code of Military Justice, 10 U.S.C. § 918. He was sentenced to be reduced to Pay Grade E-1, to be confined at hard labor for the term of his natural life, to forfeit all pay and allowances, and to

be dishonorably discharged from the service. On October 12, 1968, the convening authority, pursuant to a pretrial agreement, approved only so much of the sentence as provided for a dishonorable discharge, confinement at hard labor for 20 years, forfeiture of all pay and allowances, and reduction to Pay Grade E-1. On the same date, the convening authority designated the United States Naval Disciplinary Command at Kittery, Maine, as the place of temporary custody pending appellate review of the conviction pursuant to Article 66 of the Uniform Code of Military Justice, 10 U.S.C. § 866, and petitioner has been confined in the Disciplinary Command Barracks at Kittery since December 11, 1968. On November 7, 1969, the United States Navy Court of Military Review affirmed the findings of guilty and the sentence as approved. The Court

also denied Allen's petition for a new trial under Article 73 of the Uniform Code of Military Justice, 10 U.S.C. § 873. On February 19, 1970, the United States Court of Military Appeals denied Allen's petition for grant of review of the decision of the Court of Military Review pursuant to Article 67 of the Uniform Code of Military Justice, 10 U.S.C. § 867. Having finally exhausted his military remedies, see Gusik v. Schilder, 340 U.S. 128 (1950); Noyd v. Bond, 395 U.S. 683, 693-698 (1969)[1/], Allen has now filed in this Court a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 et seq. He has been represented by civilian counsel of his own choosing throughout the proceedings in this Court, and an evidentiary hearing has been held, at which there was received in evidence the complete record of petitioner's court-martial and subse-

quent proceedings before the military courts and such additional testimony as petitioner chose to present. Petitioner's sole contention in this Court is that he was denied his Fifth Amendment right to due process of law and his Sixth Amendment right to counsel in his court-martial proceedings because of the ineffective assistance of his trial counsel.[2/]

I

At the outset, it must be recognized that the scope of review available to a military prisoner petitioning for habeas corpus in the District Courts of the United States is considerably narrower than that available to a civilian prisoner seeking the same relief. The controlling cases are Hiatt v. Brown, 339 U.S. 103 (1950) and Burns v. Wilson, 346 U.S. 137, reh. denied, 346 U.S. 844 (1953). See also Whelchel v. McDonald, 340 U.S. 122

(1950).

In Hiatt v. Brown, supra, the Supreme Court held that it was beyond the competence of the civil courts to review due process claims arising in military proceedings. The Court said:

> The Court of Appeals also concluded that certain errors committed by the military tribunal and reviewing authorities had deprived respondent of due process. We think the court was in error in extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pretrial investigation, and the competence of the law member and defense counsel. (citation omitted) It is well settled that "by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial...The single inquiry, the test, is jurisdiction." (citation omitted) In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction

> of any errors it may have committed is for the military authorities which are alone authorized to review its decision. (citations omitted) 339 U.S. at 110-111.

In Burns v. Wilson, supra, the prevailing opinion[3/] approved Hiatt v. Brown and stated:

> The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights. In military habeas corpus cases, even more than in state habeas corpus cases, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings--of the fair determinations of the military tribunals after all military remedies have been exhausted. Congress has provided that these determinations are "final" and "binding" upon all courts. We have held before that this does not displace the civil courts' jurisdiction over an application for habeas corpus from the military prisoners. (citation omitted) But these provisions do mean that when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to

> re-evaluate the evidence. (citation omitted)
>
> ....
>
> ....[I]t is not the duty of the civil courts...to re-examine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in the applications for habeas corpus. It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims. (citation omitted) 346 U.S. at 142, 144 (emphasis supplied)

The Supreme Court has neither elaborated nor modified the "fair consideration" test pronounced in Burns v. Wilson in any material respect.[4/] Although the restrictiveness of the Burns rule has been questioned by some courts, Rushing v. Wilkinson, 272 F.2d 633, 641 (5th Cir. 1959), cert. denied, 364 U.S. 914 (1960); Sweet v. Taylor, 178 F. Supp. 456, 458 (D. Kans. 1959); see also Weiner, Courts-Martial and the Bill of Rights, 72 Harv.

L. Rev. 266, 303 (1958), and apparently ignored by others, White v. Humphrey, 212 F.2d 503, 507 (3rd Cir.), cert. denied, 348 U.S. 900 (1954); Harris v. Ciccone, 290 F. Supp. 729, 733 (W.D. Mo. 1968); In re Stapley, 246 F. Supp. 316, 320-322 (D. Utah 1965), cf. Ashe v. McNamara, 355 F.2d 277, 280 n. 3 (1st Cir. 1965), it is now reasonably clear, at least until the Supreme Court has spoken to the contrary, that in considering constitutional claims presented by military prisoners, a federal court's inquiry is limited to the question of whether the military tribunals have given full and fair consideration to the contentions raised by the petitioner. Kennedy v. Commandant, U. S. Naval Disciplinary Barracks, 377 F.2d 339, 342 (10th Cir. 1967); Rushing v. Wilkinson, supra, 272 F.2d at 641-642; Mitchell v. Swope, 224 F.2d 365, 366-367 (9th Cir.

1955); Bourchier v. Van Metre, 223 F.2d 646, 647-648 (D.C. Cir. 1955); Suttles v. Davis, 215 F.2d 760, 761, 763 (10th Cir.), cert. denied, 348 U.S. 903 (1954); Easley v. Hunter, 209 F.2d 483, 486-487 (10th Cir. 1953); Swisher v. United States, 237 F. Supp. 921, 924-929 (W.D. Mo. 1965), aff'd, 354 F.2d 472 (8th Cir. 1966). See generally Note, Developments in the Law - Federal Habeas Corpus, 83 Harv. L Rev. 1038, 1208-1238 (1970).

II

The contention that petitioner was denied the effective assistance of counsel in his court-martial proceedings is based upon his claim that his trial counsel in his court-martial proceedings unduly influenced and improperly persuaded him to sign a pretrial agreement and to plead guilty. Petitioner asserts that

his trial counsel failed to advise petitioner of his legal rights; that his trial counsel failed to investigate the charges against petitioner and to talk to material witnesses critical to his defense; and, most particularly, that his trial counsel failed to develop the defense of insanity and to have petitioner examined by psychiatrists prior to trial. After a careful examination of the military record, this Court is wholly satisfied that each one of these claims was fully and fairly considered and decided by the military courts on review and that there was no error in their affirmance of the judgment of the court-martial.

The military record discloses that petitioner and six other marines were arrested and charged with the premeditated and brutal murders of five Vietnamese civilians on May 5 and 6, 1968. Petit-

ioner and several of the others confessed to the killings. Petitioner was the only one charged with all five killings, and the evidence clearly indicated that he was the ringleader. Initially, petitioner was assigned as trial defense counsel, Captain John E. Russell, an officer in the Judge Advocate General's Corps, who represented him in the mandatory pretrial investigation pursuant to Article 32 of the Uniform Code of Military Justice, 10 U.S.C. § 832. Russell interviewed the available witnesses and planned a defense based principally upon petitioner's insanity. Since Russell's tour in Vietnam was to terminate before petitioner could be brought to trial, however, Russell arranged, with petitioner's approval, to have a fellow military attorney, Captain Sandy S. McMath, assume petitioner's defense. Russell turned over his complete

file to McMath in mid-July, 1968 and fully briefed him on the results of his investigation and the theory of his projected defense.

Captain McMath was a graduate of the University of Arkansas School of Law, a member of the Arkansas bar, and, like Captain Russell, was a certified Judge Advocate in conformance with Article 27(b) of the Uniform Code of Military Justice, 10 U.S.C. § 827(b). Prior to undertaking petitioner's case, he had represented a substantial number of defendants in general court-martial proceedings, and had successfully defended several servicemen charged with murder.

McMath's first inclination also was to attempt an insanity defense. Late in July, 1968, however, he became convinced that the evidence against petitioner, including his own confession, was so over-

whelming, and the chances of getting a favorable report from the military psychiatrists available in Vietnam were so remote, that petitioner's interests would be best served by the alternative tactic which has become the gravamen of petitioner's complaint.

Petitioner's conviction on any one of the five specifications of premeditated murder would have carried with it a mandatory sentence of life imprisonment or death. Uniform Code of Military Justice, Article 118, 10 U.S.C. § 918. McMath determined that the probability of winning acquittals on all five specifications was exceedingly remote. He was aware, moreover, that the issue of insanity, even if not raised at trial, could be raised on appeal before the Court of Military Review.[5/] Furthermore, McMath knew that if the appellate courts found that there was

sufficient doubt concerning petitioner's sanity to warrant a new trial, petitioner could in no event receive a longer sentence than the sentence previously imposed and approved, even if he were reconvicted of premeditated murder.[6/] McMath, therefore negotiated with the convening authority a guilty plea pursuant to a pretrial agreement which reduced the charges to "non-capital" and provided for a maximum 20-year sentence. The effect of this agreement was that, with good behavior, petitioner's maximum period of confinement would be seven years. After some hesitation, petitioner approved of this strategy and signed the pretrial agreement on August 22, 1968. McMath's plan, which he fully explained to petitioner, was to arrange for extensive civilian psychiatric evaluation upon petitioner's conviction and return to the United States and to

raise the insanity issue on appeal.

At petitioner's trial and providency hearing on September 9, 1968, McMath withheld any evidence of insanity (or of any other defense), and petitioner, in response to direct questions from the law officer, freely admitted every element of the charges against him and denied that he had any defenses thereto. McMath concurred in petitioner's statements. Petitioner's only presentation consisted of statements in mitigation and extenuation of his sentence. McMath's decision not to present any evidence which he had concerning a possible insanity defense was expressly for the purpose of maintaining the integrity of the guilty plea and the pretrial agreement.

Throughout the foregoing proceeding, petitioner expressed no dissatisfaction with McMath's performance as his defense

counsel, and in fact, following his conviction, petitioner requested that McMath be appointed his appellate defense counsel. Shortly thereafter, however, McMath was rotated back to the United States; his request that he be allowed to represent petitioner on appeal was denied by the Appellate Review Division; and another military lawyer, Captain John N. Stafford, was assigned as appellate defense counsel.

On January 23, 1969, Stafford, pursuing McMath's strategy, filed with the Navy Court of Review a motion requesting a psychiatric examination of petitioner by a three-man board of medical officers at the United States Naval Hospital, Philadelphia, Pennsylvania. This motion was based on a psychiatric examination of petitioner in San Diego, which had been arranged by McMath while petitioner was

in transit to his current place of custody in Maine. Because the psychiatrist had found that petitioner "is not suffering from any major mental illness now or in the past," the Court concluded that no reasonable doubt existed as to his sanity and denied the motion. Thereafter, on April 28, 1969, petitioner's present counsel, who had been retained by petitioner's family following his return to the United States, filed with the Court of Review the report of a second civilian psychiatrist, which set forth his diagnosis of chronic paranoid schizophrenia and his opinion that petitioner was not legally responsible for his acts at the time of the alleged offenses. The Court thereupon reconsidered its denial of the previous request for a psychiatric examination, and on May 28, 1969, remanded petitioner to the United States Naval Hos-

pital at Philadelphia, where he remained for evaluation for much of the summer. The three members of the board of medical officers, all qualified psychiatrists, filed their report on August 7, 1969. Their diagnosis was that petitioner was suffering from a passive-aggressive personality disorder, but that petitioner was not suffering from mental defect or disease so as to be unable at the time of the killings to distinguish right from wrong or to adhere to the right.[7/] Petitioner's counsel next submitted the report of a third civilian psychiatrist, whose conclusion was that petitioner had never been psychotic, but was suffering from a passive-aggressive personality disorder and probably could not distinguish right from wrong at the time of the killings. The Court of Military Review, after receiving the psychiatric report of the Navy

Medical Board and after evaluating the reports of the three civilian psychiatrists, concluded that since five of the six psychiatrists who had examined petitioner were in agreement that the accused suffered only from a personality or character disorder, which did not constitute legal insanity[8], the issue of sanity was not raised and further inquiry into petitioner's mental condition was not required. Although not assigned as error, the Court further found, in accordance with the report of the Navy Medical Board, the petitioner possessed sufficient mental capacity to understand the nature of the proceedings against him and to cooperate in his defense[9].

In written and oral argument before the Court of Military Review, and in support of his petition for review by the Court of Military Appeals, petitioner's

present counsel strenuously urged each and every allegation as to the inadequacy of petitioner's trial defense counsel which he raises in this Court. After a careful scrutiny of the extensive trial and appellate record and a thorough consideration of petitioner's allegations, the Court of Military Review rejected petitioner's contentions, and the Court of Military Appeals denied his request for review. In a comprehensive opinion, the Court of Military Review observed that trial defense counsel had serious problems to resolve in defending petitioner, who was charged with five offenses of premeditated murder, conviction of any one of which meant a mandatory life imprisonment sentence; that the evidence developed in the pretrial investigation was overwhelming to prove all five murders; that petitioner had made a full and

complete confession; that there was no definite evidence in the pretrial investigation to suggest that petitioner was not legally responsible for his actions, other than the savage and brutal nature of the killings, a fact which alone did not demonstrate a lack of responsibility (citing United States v. Dunnahoe, 6 U.S. C.M.A. 745, 21 C.M.R. 67 (1956); that trial defense counsel's decision to attempt to get a favorable pretrial agreement and to preserve the defense of insanity for appeal if favorable psychiatric evaluation could be obtained was not illegal or unethical, and did not constitute inadequate representation (citing United States v. Wimberly, 16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966); and that with the full knowledge and consent of petitioner, trial defense counsel negotiated a favorable pretrial agreement.

which provided an extremely light sentence for the offenses involved. In sum, the Court concluded, in the succinct words of Hendry, J., that "the defense is not entitled to an opportunity to retry the issues at a new trial merely because the trial tactics failed."

On the basis of the entire military re record in this case, which has been summarized above, this Court concludes that the military courts have given full and fair consideration to petitioner's present claims of the inadequacy of his trial defense counsel. It is evident that, in this case as in Burns, petitioner and his counsel "simply demand an opportunity to make a new record, to prove de novo in the District Court precisely the case which they failed to prove in the military courts. ...[D]ue regard for the limitations on a civil court's power to grant

such relief precludes such action." Burns v. Wilson, supra, 346 U.S. at 146.

III

In view of the doubt which has been raised by some courts as to whether Burns v. Wilson should be read to bar any de novo review by the civil courts of constitutional issues presented to and condidered by the military courts, this Court has independently examined both the military record and the record of the present habeas corpus hearing. On the basis of such examination, the Court is satisfied that nothing of significance was brought out in the habeas corpus hearing which was not considered by the Navy Court of Review, or which would justify this Court in concluding that McMath's representation of petitioner in his court-martial proceedings was so inadequate as to constitute a denial of

petitioner's constitutional right to the effective assistance of counsel.

It must be remembered that the overriding issue in this case is the soundness of Captain McMath's decision in August and September, 1968 to plead petitioner guilty pursuant to the pretrial agreement and to withhold the insanity defense for later review. McMath was presented with a crucial tactical decision. Either petitioner defended on the merits, and faced a near certain conviction and mandatory life sentence on each specification, or he pleaded guilty, received a maximum sentence of 20 years (which good behavior could reduce to seven years), and preserved the insanity issue for a later time when more sympathetic help could be obtained and the likelihood of a complete acquittal would be greater. He chose the latter course,

with petitioner's complete approval and cooperation.

Under such circumstances, petitioner has failed to show that McMath's advice was so inept that he lacked the minimum standards of competence necessary to satisfy petitioner's constitutional right to counsel. In order to assume constitutional proportions, "a lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." United States ex rel Boucher v. Reincke, 341 F.2d 977, 982 (2d Cir. .965) (quoting from United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950); Snead v. Smyth, 273 F2d 838, 842 (4th Cir. 1959); Diggs v. Welch, 148 F. 2d 667, 669-670 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945). "Mere improv-

ident strategy, bad tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective assistance of counsel, unless taken as a whole the trial was a 'mockery of justice.'" Edwards v. United States, 256 F.2d 707, 708 (D.C. Cir.) (Burger, J.), cert. denied, 258 U.S. 347 (1958). Accordingly, the courts have consistently refused to reassess by hindsight the judgment of defense counsel on questions of strategy, trial tactics or trial decision. See, e.g., Bruce v. United States, 379 F.2d 113, 116-118 (D.C. Cir. 1967); Frand v. United States, 301 F.2d 102, 103 (10th Cir. 1962); Alexander v. United States, 290 F.2d 252, 254 (5th Cir.), cert. denied, 368 U.S. 891 (1961). And, with particular reference to the charge that defense counsel improperly advised a guilty plea, it has been repeatedly held that

what retroactively may appear to have been an error of judgment on the part of counsel does not establish a violation of the defendant's constitutional right. See e.g., Bruce v. United States, supra, Alexander v. United States, supra; Kennedy v. United States, 259 F.2d 883 (5th Cir. 1958), cert. denied, 359 U.S. 994 (1959); Diggs v. Welch, supra.[10/]

Certainly, when petitioner's allegations are measured by the foregoing standard, the Court cannot say that McMath's decision was so unsound and his representation of petitioner was so ineffective "as to shock the conscience of the court and make the proceedings a farce and mockery of justice." Rather, this is clearly a case where hindsight reveals a possible tactical error "over which conscientious attorneys might differ." United States v. Garguilo, 324 F.

2d 795, 797 (2d Cir. 1963). As the Court said in Alexander v. United States, supra, "the strategy, viewed as a calculated risk, as of the time of the plea, cannot be criticized." 290 F.2d at 254. To the extent, therefore, that it is permissible for this Court to review de novo the decision of the military courts that petitioner was not denied the effective assistance of counsel, the Court is satisfied that McMath's representation of petitioner was not so inadquate as to constitute a denial of constitutional right.

IV

The Court holds that the military courts gave full and fair consideration to petitioner's present claim of ineffective representation of counsel at his court-martial proceedings. The Court further holds that the entire record in this case reveals no deprivation of pet-

itioner's constitutional right to the effective assistance of counsel. It is therefore

ORDERED that the petition is DISMISSED and the writ DENIED.

Dated at Portland, Maine, this 4th day of August 1970.

/s/ Edward T. Gignoux
United States District Judge

1/ Two prior habeas corpus petitions from Allen were dismissed by this Court for failure to exhaust all available military remedies: Allen v. VanCantfort, No. 10-183 (D. Me., May 16, 1969); Allen v. VanCantfort, No. 11-3 (D. Me., July 18, 1969), aff'd, 420 F.2d 525 (1st Cir. 1970). A habeas corpus petition filed by Allen with the Court of Military Appeals was also denied by that Court on May 29, 1969.

2/ Petitioner makes no contention that his court-martial was not properly constituted, or that it did not have jurisdiction over his person and over the crime with which he was charged. Nor does he raise in this Court various other challenges to the court-martial proceedings which he urged before the military courts on review.

3/ Mr. Chief Justice Vinson wrote the

plurality opinion, in which Mr. Justice Reed, Mr. Justice Burton and Mr. Justice Clark joined. Mr. Justice Jackson concurred in the result, without opinion. 346 U.S. at 146. Mr. Justice Minton concurred on the ground that civilian courts can only review the formal jurisdiction of a military court. Id. Mr. Justice Douglas, joined by Mr. Justice Black dissented, arguing that, as in review of state convictions, any denial of due process entitles military petitioners to habeas relief. 346 U.S. at 150. Mr. Justice Frankfurter wrote a separate opinion, 346 U.S. at 148, expanded upon denial of rehearing, 346 U.S. at 844, in which he expressed the view that the issues were not ripe for decision.

4/ The Court said it was following Burns in Fowler v. Wilkinson, 353 U.S. 583, 584 (1957), and passing references to Burns may be found in United States v. Augenblick, 393 U.S. 348, 350 n. 3, 351 (1969); Morse v. Boswell, 393 U.S. 802, 809 (1968) (Douglas, J. dissenting to mem. denial of application to stay), cert. denied, 393 U.S. 1052 (1969); Reid v. Covert, 354 U.S. 1, 37 n. 68, 56 (1957). None of these references are enlightening.

5/ Manual for Courts-Martial United States (1951), ¶ 124:

> After consideration of the record as a whole, if it appears to the convening authority or higher authority that a reasonable doubt exists as to

> the sanity of the accused, he should disapprove any findings of guilty of the charges and specifications affected by such doubt and take appropriate action with respect to the sentence. Such authority will take the action prescribed in 121 before taking action on the record whenever it appears from the record of trial or otherwise that further inquiry as to the mental condition of the accused is warranted in the interest of justice, regardless of whether any such question was raised at the trial or how it was determined if raised.

Paragraph 124 of the revised edition of the Manual (effective August 1, 1969), in relevant part, is substantially identical.

In United States v. Burns, 2 U.S.C.M.A. 400, ___, 9 C.M.R. 30, 34-36 (1953), the Court of Military Appeals held that a Board of Review (now the Court of Military Review) is a "higher authority" within the meaning of paragraph 124. The Court of Military Appeals has also affirmed the authority of the Court of Military Review to take appropriate action when an issue is raised at the appellate level as to the mental condition of the accused, even though no such question was raised at the trial. See, e.g., United States v. Thomas, 13 U.S.C.M.A. 163, ___, 32 C.M.R. 163, 168-169 (1962); United States v. Roland, 9 U.S.C.M.A. 401, ___, 26 C.M.R. 181, 184-185 (1958).

6/ Manual for Courts-Martial United States

(1951), ¶ 109(g)(2). This provision is found in ¶ 110(2) in the 1969 edition.

7/ See Manual for Courts-Martial United States (1951), ¶ 120(b); 1969 edition ¶ 120(b).

3/ Id.

9/ See Manual for Courts-Martial United States (1951), ¶ 120(c); 1969 edition ¶ 120(d).

10/ The standard for effective legal representation in the military courts, like thatin federal courts, is not perfection. As the Court of Military Appeals noted in United States v. Bigger, 2 U.S.C.M.A. 297, ___, 8 C.M.R. 97, 101-102 (1953), the Court will not "condemn" counsel merely because they lost" or because "they might ... have adopted what may, at this level, appear to have been a better strategic approach." But military courts have consistently imposed upon counsel a standard equal to that demanded by the federal courts. United States v. Hunter, 2 U.S.C.M.A. 37, ___, 6 C.M.R. 37, 40-42 (1952); United States v. Parker, 6 U.S.C.M.A. 75, ___, 19 C.M.R. 201, 211-213 (1955); United States v. Horne, 9 U.S.C.M.A. 60, ___, 26 C.M.R. 381, 384-386 (1958); United States v. Huff, 11 U.S.C.M.A. 397, ___, 29 C.M.R. 213, 216-218 (1960).

A true copy
Attest:
Morris Cox, Clerk
by Elise H. Clarity Deputy Clerk

CONSTITUTION OF THE UNITED STATES, AMENDMENT 5

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

CONSTITUTION OF THE UNITED STATES, AMENDMENT 6

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the assistance of counsel for his defense."

ARTICLE 45, UNIFORM CODE OF MILITARY JUSTICE, TITLE 10, FEDERAL CODE

ANNOTATED, § 845

"Pleas of the Accused - (b). A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged."

ARTICLE 49(d)(f), UNIFORM CODE OF MILITARY JUSTICE, DEPOSITIONS

"(d) A duly authenticated deposition taken upon reasonable notice to the other parties, so far as otherwise admissible under the rules of evidence, may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or military board, if it appears - ...
(f) Subject to subsection (d), a deposition may be read in evidence in any case in which the death penalty is authorized but is not mandatory, whenever the convening authority directs that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial."

ARTICLE 118, UNIFORM CODE OF MILITARY JUSTICE, MURDER

"Any person subject to this code who, without justification or excuse, unlawfully kills a human being, when he -

(1) has a premeditated design to kill; or
(2) intends to kill or inflict great bodily harm; or
(3) is engaged in an act which is in-

herently dangerous to others and evinces a wanton disregard of human life; or
(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4) of this article, he shall suffer death or imprisonment for life as a court-martial may direct.

PARAGRAPH 70, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951), PLEAS

"...A plea of guilty by the accused shall not be received to any charge or specification alleging an offense for which the death penalty may be adjudged. (Article 45b; see 15a (3), but a plea of guilty may be received as to a non-capital offense which is necessarily included in a capital offense alleged."

PARAGRAPH 121, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951), INQUIRY BEFORE TRIAL

"If it appears to any commanding officer who considers the disposition of charges as indicated in 32, 33, and 35 or to any investigating officer (34), trial counsel, or defense counsel that there is reason to believe that the accused is insane (120c) or was insane at the time of

the alleged offense (120b), that fact and the basis of the observation should be reported through appropriate channels in order that an inquiry into the mental condition of the accused may be conducted before trial. When the report indicates substantial basis for the belief, the matter will be referred to a board of one or more medical officers for their observation and report with respect to the sanity of the accused. At least one member of the board should be a psychiatrist. The board should be fully informed of the reasons for doubting the sanity of the accused and, in addition to other requirements, should be required to make separate and distinct findings as to each of the three following questions:

a. Was the accused at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged to distinguish right from wrong (120b)?
b. Was the accused at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged to adhere to the right (120b)?
c. Does the accused possess sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense (120c)?

To determine these questions the board should place the accused under

observation, examine him, and conduct such further investigation as it deems necessary. On the basis of this report, further action in the case may be suspended, or the charges may be dismissed by an officer competent to appoint a court-martial appropriate to try the offense charged, or proceedings may be taken to discharge the accused from the service on the grounds of his mental disability, or the charges may be referred for trial. Such additional mental examinations may be directed at any stage of the proceedings as circumstances may require. The officer directing or requesting the mental examination of the accused will attach the report of examination to the charges if referred for trial or forwarded."

PARAGRAPH 124, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951)

"After consideration of the record as a whole, if it appears to the convening authority or higher authority that a reasonable doubt exists as to the sanity of the accused, he should disapprove any findings of guilt of the charges and specifications affected by such doubt and take appropriate action with respect to the sentence. Such authority will take the action prescribed in 121 before taking action on the record whenever it appears from the record of trial or otherwise that further inquiry as to the mental condition of the accused is warranted in the interest of justice, regardless of whether any such question was raised at the trial or how it was determined if raised."

PARAGRAPH 144d, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951)

"...entries in a report of a board of medical officers (psychiatrists) as to the mental condition of a certain individual are not admissible to prove such mental condition, for a diagnosis of a mental condition involves opinion to such degree as to require that those making such a diagnosis be subject to cross-examination."

PARAGRAPH 145, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951) DEPOSITIONS, FORMER TESTIMONY

"a. Depositions.-See Article 49. For procedure in taking depositions see 117. Any case referred to a special court-martial for trial under 15a(1) is a case "not capital" within the meaning of Article 49..."

PARAGRAPH 154a(1)(3)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951)

"(1) General.-In certain offenses, such as burglary, larceny, and certain kinds of desertion, a specific intent is necessary. In the kind of murder denounced by Article 118 (1) a premeditated design to kill must be proved...
(3) Ignorance of fact.-Unless otherwise provided (expressly or by implication) by the law denouncing the offense in question, ignorance or mistake of fact will exempt a person from criminal responsibility if it is an honest ignorance or mistake and not the result of carelessness or

fault on his part.
(4) Ignorance of law.-As a general rule, ignorance of law, or of regulations or directives of a general nature having the force of law, is not an excuse for a criminal act. However, if a special state of mind on the part of the accused, such as a specific intent, constitutes an essential element of the offense charged, an honest and reasonable mistake of law, including an honest and reasonable mistake as to the legal effect of known facts, may be shown for the purpose of indicating the absence of such a state of mind..."